Supreme Court, U.S.
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No. 86-637

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
*Petitioners,*

v.

HARRY E. BECK, JR., *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

The question presented in the petition for a writ of certiorari is:

> Whether an employee of a private sector employer in an industry to which the National Labor Relations Act applies states a good federal cause of action, under either the NLRA or the First Amendment, by the claim that the union acting as the employee's exclusive representative expends money collected pursuant to a union security provision for purposes to which the employee objects?

In granting the petition, this Court directed the parties to address as well "the applicability of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)" to the claims presented by plaintiffs.*

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* In addition to the parties listed as petitioners in the caption to this petition, the following entities were listed as appellants-cross-appellees in the court of appeals: CWA Committee on Political Education; Local 2350, CWA; AFL-CIO; AFL-CIO Committee on Political Education; Maryland State AFL-CIO; American Telephone & Telegraph; and C&P Telephone Company of Maryland. (Each of these parties was named as a defendant in the district court, but the case was dismissed or settled as to each of the above-listed parties in the district court, and none is a petitioner here.)

In addition to the individual listed as respondent in the caption to this petition, the following additional individuals were appellees-cross-appellants in the court of appeals and are respondents in this Court: Dorris R. Ambrose; Jacqueline S. Brandon; Mary Anna Cox; Sally B. DiMauro; Rue T. F. Downey; Kathleen A. Heil; John J. Hurley; Harriett Lipschultz; Clay B. Lutz; Barbara McGaughgey; Ronald R. Merkle; Ethel T. Merryman; Doris J. Morrow; Marion F. Northrop; Frances M. Phyllis; Vivian Reedy; Barbara A. Russell; Lois A .Stallings; and Harry B. Swartz, Sr.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 6 |
| I. THE APPLICABILITY OF *GARMON* | 6 |
| II. THE MERITS OF PLAINTIFFS' CLAIMS | 11 |
| A. The Governmental Action Issue | 12 |
| B. The Statutory Question | 21 |
| 1. The Statutory Language | 21 |
| 2. The Legislative History | 23 |
| 3. The Asserted Analogy to the Railway Labor Act | 40 |
| C. The Lessons | 43 |
| CONCLUSION | 48 |

## TABLE OF AUTHORITIES

*Cases:* Page

*Abood v. Detroit Board of Education*, 431 U.S. 209 ..... 2, 12-13, 21, 40-41
*Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949) ..... 24
*Baker v. Amsted Industries, Inc.*, 656 F.2d 1245 (7th Cir. 1981) ..... 9
*Blum v. Yaretsky*, 457 U.S. 991 (1982) ..... 13-16
*Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) ..... 6, 12
*Brown v. Hotel Employees*, 468 U.S. 491 (1984) .. 6
*Burlington & Northern Railroad v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 55 L.W. 4576 (April 28, 1987) ..... 12
*Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570 (1971) ..... 7
*Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 55 L.W. 5005 (June 24, 1987) ..... 15-16
*Colgate Co. v. Labor Board*, 338 U.S. 355 (1949) .. 24
*Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975) ..... 10
*Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980) ..... 24
*Del Costello v. Teamsters*, 462 U.S. 151 (1983) .... 9
*Doud Box Co. v. Courtney*, 368 U.S. 502 (1967) .... 39
*Electrical Workers v. Foust*, 442 U.S. 42 (1978) .... 8, 44
*Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) .. 8
*Ford Motor Co. of Canada*, 1 BNA Arb. Rep. 439, 17 LRRM 2783 (1946) ..... 34
*Howard Johnson Co. v. Hotel Employees*, 417 U.S. 272 (1974) ..... 14
*Hudgens v. NLRB*, 424 U.S. 507 (1976) ..... 43
*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1975) ..... 12, 15, 16, 17, 21
*Johnson v. Robison*, 415 U.S. 361 (1974) ..... 10
*INS v. Cardoza-Fonseca*, —— U.S. ——, 55 L.W. 4313 (March 9, 1987) ..... 23
*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) .. 6, 10
*Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983) ..... 47-48

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Lugar v. Edmonson*, 457 U.S. 922 (1982) | 13 |
| *Machinists v. Wisconsin Empl. Rel Comm'n*, 427 U.S. 132 (1976) | 6 |
| *Machinists v. Street*, 367 U.S. 740 (1961) | 12, 40-43 |
| *Mailers Union No. 40* (Detroit Publishers Ass'n), 792 NLRB 952 (1971) | 23 |
| *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir.) | 9 |
| *NLRB v. Financial Institution Employees*, —— U.S. ——, 54 L.W. 4203 (Feb. 26, 1986) | 35 |
| *NLRB v. General Motors*, 373 U.S. 734 (1963) | 2, 23, 37, 45 |
| *Pipefitters v. United States*, 407 U.S. 385 (1972) | 35, 39 |
| *Price v. Auto Workers*, 195 F.2d 1128 (2d Cir. 1986), *pet. for cert. pending*, No. 86-1055 | 12, 14, 21, 46, 47, 48 |
| *Radio Officers Union v. Labor Board*, 347 U.S. 1742 (1954) | 21 |
| *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956) | 11, 19-21, 40 |
| *Rendell-Baker v. Kohn*, 457 U.S. 930 (1982) | 13, 15, 43 |
| *Rite Form Corset Co.*, 75 NLRB 174 (1947) | 10 |
| *San Diego Unions v. Garmon*, 359 U.S. 236 (1959) | 4, 6-10 |
| *San Francisco Arts & Athletics v. USOC*, U.S. ——, 55 L.W. —— (June 25, 1987) | 13-18, 21 |
| *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) | 8 |
| *Steelworkers v. Weber*, 443 U.S. 192 (1979) | 19 |
| *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) | 19 |
| *Union Starch & Refining Co.*, 87 NLRB 779 (1949), *enf'd*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 | 23 |
| *United States v. James*, —— U.S. ——, 54 L.W. 5030 (July 2, 1986) | 21 |
| *Vaca v. Sipes*, 386 U.S. 171 (1967) | 4, 7-10, 44, 45 |

TABLE OF AUTHORITIES—Continued

*Statutes:* Page

National Labor Relations Act as amended,
§ 8(a)(3), 29 U.S.C. § 158(a)(3) ..... *passim*
§ 8(b)(2), 29 U.S.C. § 158(b)(2) ..... 6, 22
§ 8(b)(5), 29 U.S.C. § 158(b)(5) ..... 35-37
§ 14(b), 29 U.S.C. § 164(b) ..... 21
Labor Management Relations Act of 1947, 61 Stat. 136 § 304 ..... 35
Railway Labor Act as amended, § 2, Eleventh, 45 U.S.C. § 152, Eleventh ..... 7, 19-21, 40-43
2 U.S.C. § 437 ..... 35
57 Stat. 167 ..... 27
61 Stat. 601 ..... 25

*Miscellaneous:*

H.R. 3020, 80th Cong., 1st Sess. (1947) ..... 25-27
S. 1126, 80th Cong., 1st Sess. (1947) ..... 28
H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) .... 26, 27
H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947) .... 34-35, 37
S. Rep. No. 573, 74th Cong., 1st Sess. (1935) ..... 24
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) ..... 29-30
Hearings Before the Senate Committee on Labor and Public Welfare on S.55 and S.J. Res. 22, 80th Cong., 1st Sess. (1947) ..... 25
National Labor Relations Board, *Legislative History of the National Labor Relations Act* ..... 24
National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947* ..... 25-37, 39
Dulles & Dubofsky, *Labor in America* (4th ed. 1984) ..... 24

## BRIEF FOR PETITIONERS

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### OPINIONS BELOW

The decision of the court of appeals, sitting *en banc*, is reported at 800 F.2d 1280, and is reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-28a. The opinion of the court of appeals' panel that heard the case is reported at 776 F.2d 1187, and is reprinted at Pet. App. 29a-106a. The opinion and order of the district court granting partial summary judgment to plaintiffs and referring the case to a special master for remedial determinations is reported at 468 F. Supp. 93 and is reprinted at Pet. App. 135a-142a. The opinions of the special master and of the district court on appeal from the special master are all unreported and are reprinted at Pet. App. 110a-310a.

### JURISDICTION

The *en banc* decision and judgment of the court of appeals were entered on September 12, 1986. The petition for a writ of certiorari was filed on October 17, 1986 and was granted on June 1, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are reprinted as an appendix to this brief at pp. 1a-3a.

### STATEMENT OF THE CASE

The Communications Workers of America ("CWA" or "the Union"), petitioner herein, is the exclusive representative of employees of the American Telephone and Telegraph Company ("AT&T") and the Chesapeake and Potomac Telephone Company of Maryland ("C&P"). Pursuant to collective bargaining agreements between

the Union and the Companies, all the employees represented by the Union, including nonmembers, are required, as a condition of employment, to pay to the Union an "agency fee" in an "amount equal to the periodic dues" paid by union members.

This action was commenced on June 3, 1976 by twenty individual plaintiffs, respondents herein, who at all times relevant were employed at AT&T or C&P and who elected not to become union members. Plaintiffs' complaint alleges that the "union security" clause in the collective-bargaining agreement deprives plaintiffs of a variety of common law, statutory and constitutional rights.[1]

On March 16, 1979, the district court, acting *sua sponte*, granted partial summary judgment to plaintiffs. That court concluded that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment . . . violates the First Amendment rights of the plaintiffs," and the district court therefore held that the Union was required "to refund to each plaintiff for every year since January 1, 1976, an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract admin-

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[1] Union security clauses are of two general types. "Agency shop" agreements require covered employees to pay an "agency fee" in an amount equal to union dues; "union shop" agreements require the covered employees to become members of the union which entails paying union dues within a specified period of time after hire. But under *NLRB v. General Motors*, 373 U.S. 734, 742 (1963), "membership" has been "whittled down to its financial core," which is to say that "membership, insofar as it has significance for employment rights, may . . . be conditioned only upon payment of fees and dues." Accordingly, "although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the 'practical equivalent' of an agency shop." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977). For that reason, in this brief we use the generic term "union security agreement" to refer to agency shop and union shop agreements. *See also* p. 24 infra (discussing closed shops).

istration, and grievance adjustment." *Id.* at 141a-142a. The district court referred the case to a special master to determine the amount of the refund.[2]

On appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment as to liability. The Union then sought rehearing *en banc* which the court of appeals granted.

On rehearing, the *en banc* court, by a vote of 6-4, reaffirmed the judgment of the panel. The majority of that court was unable to agree upon a single rationale or an opinion to explain its decision, but instead issued a brief *per curiam* order which recorded that five judges voted to affirm the judgment on the basis of § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) ("NLRA" or "the Act"); two of these judges also relied on the First Amendment to the United States Constitution in voting to affirm; and one additional judge (Murnaghan, J.) disagreed with the majority and agreed with the dissenters on all other issues but was persuaded that the Union by negotiating and entering into the union security agreement breached its statutory duty of fair represntation under the NLRA.[3] The order of the *en banc* court thus concluded:

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[2] After receiving and reviewing two reports from a special master, the district court eventually entered a judgment fixing the amount of the refund and mandating certain procedures to be followed in the future by CWA in collecting fees from plaintiffs. *See* Pet. App. 107a-09a. The propriety of these rulings, as modified by the court of appeals, is not before the Court at this time.

[3] The judges who voted to affirm on the basis of § 8(a)(3) also invoked the duty of fair representation, *see* Pet. App. 5a, but it is unclear from the *per curiam* order whether for these judges the fair-representation violation was entirely derivative of the § 8(a)(3) violation, or whether these judges attached independent significance to the duty of fair representation in this context. Judge Murnaghan made clear in his concurring opinion on rehearing *en banc* that he was of the latter view; indeed, Judge Murnaghan alone found a fair-representation violation but no § 8(a)(3) violation.

The result is that 6 judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds. [*Id.* at 6a].

## SUMMARY OF ARGUMENT

I. Of the claims considered by the courts below, two fall within the jurisdiction of the federal courts but one does not. *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), bars the federal (and state) courts from entertaining a claim which seeks relief on the theory that the defendant has violated § 8(a)(3) of the National Labor Relations Act because the National Labor Relations Board has exclusive primary jurisdiction to interpret that Act. But under *Vaca v. Sipes*, 386 U.S. 171 (1967), the *Garmon* doctrine does not bar the federal courts from entertaining a claim that the union breached its duty of fair representation, even though such a claim may be brought before the Labor Board as well. And the *Garmon* doctrine does not preclude the courts from entertaining constitutional challenges to the NLRA, or to conduct regulated by the NLRA, since the Labor Board does not adjudicate such claims. Pp. 6-10 *infra*.

II. On the merits of plaintiffs' fair representation claim, it is our primary submission that in enacting the NLRA Congress specifically decided to leave unions free to negotiate union security agreements of the type involved here, and that therefore CWA's conduct in negotiating and enforcing such an agreement cannot violate the duty of fair representation. That duty, as this Court has held, is a "statutory" duty, one that is implied from the NLRA. Because that is so, it would make no sense to hold a union guilty of a fair-representation violation if the union did only that which Congress, in enacting the NLRA, intended to leave the union free to do. We therefore demonstrate at some length that both the plain language of § 8(a)(3) and its legislative history compel the conclusion that Congress decided not to proscribe union

security agreements requiring all members of a bargaining unit to pay an amount equal to union dues. (Because we rely on § 8(a)(3) to define the scope of the fair-representation duty, it is incumbent upon the Court, in exercising its jurisdiction over the fair-representation claim, to resolve this issue of statutory interpretation.) Pp. 21-40, 43-45 *infra.*

We recognize, of course, that this Court has concluded that § 2, Eleventh of the Railway Act does proscribe union security agreements of the type involved here. But as we show, the structure and history of the RLA are materially different from the NLRA with respect to the matters at issue in this case and as a result the considerations that underlay the RLA decisions compel precisely the opposite conclusion here. Pp. 40-43 *infra.*

There is a second and independent reason why plaintiffs' fair-representation claim must be rejected: even without the guidance provided by § 8(a)(3), there would be no basis for concluding that a union acts arbitrarily, discriminatorily, or in bad faith by requiring all persons in a bargaining unit to pay the same amount to the union, or by using dues money to engage in activities away from the bargaining table that further the interests of the workers the union represents. Pp. 45-48 *infra.*

Fianlly, plaintiffs' First Amendment claim fails for a very simple reason: the actions of the CWA and the private employers with which it deals in negotiating and enforcing union security agreements are private actions, and not actions attributable to the state. As this Court has recognized, the basis on which the Court found state action with respect to union security agreements negotiated in an industry regulated by the RLA is lacking with respect to union security agreements in industries to which the NLRA applies. And there is no other basis on which the conduct of these private parties can be imputed to the State. Pp. 12-21 *infra*

## ARGUMENT

### I. THE APPLICABILITY OF *GARMON*.

A. Five members of the *en banc* court "voted that federal jurisdiction 'over plaintiffs' statutory suit against defendant union under § 8(a)(3) [of the NLRA] . . . was properly invoked under 28 U.S.C. § 1337.'" Pet. App. 5a. This ruling is plainly wrong. *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), bars the federal courts from entertaining a claim which seeks relief on the theory that the defendant has violated § 8(a)(3) (or its cognate provision dealing with unfair labor practices committed by labor unions, § 8(b)(2)). In *Garmon* the Court held: "When an activity is arguably subject to § 7 of § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245 (emphasis added).

Although most of the cases in the *Garmon* line have involved the jurisdiction of state courts to grant relief, the quoted passage makes clear that its holding precludes federal court jurisdiction likewise. This is because the rationale of the doctrine is not that the NLRA works a substantive supercession of state law, but that the exclusive primary jurisdiction to determine whether there has been a violation of NLRA § 8 is vested in the National Labor Relations Board ("NLRB"). As the Court also said in *Garmon*: "It is essential to the administration of the Act that these determinations [as to the scope of § 8] be left in the first instance to the National Labor Relations Board." 359 U.S. at 244-245.[4]

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[4] The Court has frequently used the phrase "primary jurisdiction" to describe the basis of the *Garmon* doctrine. *See e.g., Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 138 (1976), *quoting Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, n.19 (1969); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982); *Brown v. Hotel Employees*, 468 U.S. 491, 502 (1984).

The only explanation given below for exercising jurisdiction over the asserted violation of § 8(a)(3) notwithstanding *Garmon* is that of Judge Russell writing for the panel majority. He reasoned that since there is

> jurisdiction under section 1337 over a statutory claim under section 2, eleventh [of the Railway Labor Act 49 U.S.C. §§ 151 *et seq.* ("RLA")] . . . by the same token there is jurisdiction over the statutory claim under section 8(a)(3) here.

This reasoning is fallacious. The NLRA establishes an administrative agency to determine whether an unfair labor practice has been committed, whereas suits for violation of the RLA are committed exclusively to the courts. *See Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570 (1971).

B. Both the five-judge plurality and Judge Murnaghan concluded that there is federal jurisdiction to decide plaintiffs' claim that the Union had violated its duty of fair representation. Pet. App. 5a. We agree that, on the authority of *Vaca v. Sipes*, 386 U.S. 171, 176-188 (1967), the federal courts do have such jurisdiction.

In *Vaca*, the union "challenged the jurisdiction of the Missouri courts" over a complaint which this Court construed to allege a breach of the duty of fair representation [5]; the union argued that plaintiff's claim fell "within the exclusive jurisdiction of the NLRB" under *Garmon*. *See Vaca*, 386 U.S. at 176. This Court squarely "reject[ed] this argument," *id.* at 177, and held "the *Garmon* preemption doctrine inapplicable" in the fair-representation context, *id.* at 188.

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[5] The complaint in *Vaca* alleged what the plaintiff, in his brief to this Court, described as "an uncomplicated action by an agent against his principal, under Missouri law for arbitrary and malicious failure to perform the principal's contractual duty." Br. for Resp. in U.S. No. 114 at 5. This Court concluded, however, that because the Union's "duty [is] grounded in federal statutes . . . federal law therefore governs [plaintiff's] cause of action." 386 U.S. at 177.

Although *Vaca* involved a complaint over the manner in which the union had handled a contractual grievance, and although the Court's analysis relied in part on "some intensely practical considerations . . . which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," *id.* at 183, the holding of *Vaca* is not limited to the contract-enforcement context. From the first, the duty of fair representation, and the judicial cause of action for breach of that duty that has been "judicially 'implied from the statute,'" *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1978), *quoting Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944), have been understood to address a union's actions in negotiating as well as in enforcing a collective bargaining agreement. Indeed, *Steele* itself as well as *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) were contract-negotiation cases. Against this background, *Vaca*'s exception to the *Garmon* preemption rule must be understood to protect the courts' jurisdiction over fair-representation claims involving either the negotiation or the enforcement of a labor contract.

The holding of *Vaca* with respect to the court's jurisdiction raises a quite separate, and not yet fully resolved, series of questions concerning the relationship between the fair-representation cause of action and the jurisdiction of the NLRB. For example, at the very least it seems clear that the courts should not allow the rubric of the duty of fair representation to be used to create a judicial cause of action for unfair labor practices, thereby enabling the courts to do precisely that which *Garmon* says may not be done. *Vaca* itself proceeds from the premise that the duty of fair representation has a specific and limited office within the framework of the NLRA: to provide a "bulwark to prevent arbitrary union conduct." 386 U.S. at 182. Thus, under *Vaca*, it is not necessary for the courts, in exercising their fair-representation jurisdiction, to decide whether the defendant union trans-

gressed some prohibition contained in § 8(b) because proof of such a transgression does not establish a fair-representation violation; rather, a fair-representation plaintiff, to prove his case, must meet the separate legal standard stated in *Vaca* by establishing that the Union engaged in conduct which is "arbitrary, discriminatory or in bad faith," 386 U.S. at 190.

The Seventh Circuit has suggested that the courts should be more circumspect and "limit" the "fair representation doctrine . . . to avoid inappropriate interference with the National Labor Relations Board's exclusive jurisdiction over unfair labor practices." *Baker v. Amsted Industries, Inc.*, 656 F.2d 1245, 1250 (7th Cir. 1981). It is not clear precisely what the Seventh Circuit's envisions in this regard and to what extent that court proposes to hold that the fair representation cause of action does not extend to conduct which constitutes an independent violation of NLRA § 8(b). Nor has this Court ever addressed that question in terms.[6]

Given the jurisdictional holding of *Vaca*, the questions referred to above are *merits* issues pertaining to the substance of the fair representation cause of action, *viz.*, to what extent should substantive rules be developed which limit that cause of action in order to protect the province of the NLRB. We explore some such issues *infra* at 43-44, insofar as the issues pertain to plaintiffs' claim here. But for present purposes it suffices to note that under

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[6] The NLRB is of the view that § 8(b)(1) incorporates the duty of fair representation and that therefore every violation of that duty constitutes an unfair labor practice as well. *See Miranda Fuel Co.*, 140 NLRB 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir.). *Vaca* holds that the Board's belated assertion of jurisdiction over fair-representation claims—whether or not proper, *see DelCostello v. Teamsters*, 462 U.S. 151, 170 (1983)—does not suffice to justify denying victims of such wrongs a judicial remedy. But neither *Vaca* nor any other decision of this Court addresses whether the fair-representation cause of action should be limited so as to preclude relief in cases in which the conduct at issue has traditionally constituted an independent unfair labor practice.

*Vaca* at least this much is clear: the federal courts have *jurisdiction* to decide such issues in the course of adjudicating the merits of various fair-representation claims. Thus, the lower courts properly exercised jurisdiction over the fair-representation claim here.

The *Vaca* jurisdictional holding is significant in one other respect here. In authorizing the courts to decide whether a union has breached its statutory duty of fair representation, *Vaca* necessarily authorizes—indeed requires—the courts to determine the scope of that duty in light of the entire NLRA, including the provisions which specify what is lawful and is not lawful thereunder. *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), and *Kaiser Steel Corp.* v. *Mullins*, *supra*, 455 U.S. at 85, both teach that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." That rule applies *a fortiori* in the present context. Because the duty of fair representation is itself "judicially *implied*" from the NLRA, the courts must, in deciding whether certain conduct violates that duty, consider at the outset whether Congress has, in that same statute, determined that such conduct would not be unlawful under federal law.

C. Plaintiffs' claim under the First Amendment is not subject to the primary jurisdiction of the Labor Board under the *Garmon* doctrine. It is the courts, rather than the Board, which are "the primary tribunals," 359 U.S. at 244, to adjudicate such issues as the meaning of the Constitution, and whether there is the requisite "state action" to bring the Constitution into play. As the Court reaffirmed in *Johnson v. Robison*, 415 U.S. 361, 368 (1974): "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." The Board itself has long understood this:

> As an administrative agency of the Federal Government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. Such questions will be left to the courts. [*Rite-Form Corset Co.*, 75 NLRB 174, 176 (1947).]

## II. THE MERITS OF PLAINTIFFS' CLAIMS.

As we have seen, the lower courts properly exercised jurisdiction over one of plaintiffs' statutory claims—the claim of breach of the duty of fair representation—as well as over plaintiffs' constitutional claim. Those two claims present alternative legal theories by which plaintiffs challenge the conduct of the Union (and the employers) in negotiating and enforcing a union security agreement.

With respect to plaintiffs' statutory claim, it is our primary submission that in enacting the NLRA Congress specifically decided not to prohibit union security agreements of the type involved here, and that therefore CWA's conduct in negotiating and enforcing such an agreement cannot violate the duty of fair representation. With respect to plaintiffs' constitutional claim, we contend that the claim fails for lack of state action.

Because the presence *vel non* of state action is relevant both to the statutory as well as to the constitutional question—if state action were present plaintiffs' attack on the statute would raise a colorable constitutional claim which the Court might seek to avoid through a limiting construction of the NLRA—we begin by demonstrating that plaintiffs are challenging only private conduct. We then show that Congress expressly decided not to prohibit such conduct. Finally, we draw the lessons of this analysis for the specific claims presented here.

One preliminary observation is in order. We realize, of course, that in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), this Court concluded that the negotiation of a union security agreement in an industry regu-

lated by the *Railway Labor Act* constitutes action attributable to the government, and that in *Machinists v. Street*, 367 U.S. 740 (1961), the Court concluded, largely because of *Hanson*, that the RLA does not permit the unions and employers covered by that Act to require those who object to supporting the union to pay the full amount of union dues. But as this Court has cautioned, "[e]ven rough analogies [between the NLRA and RLA] must be drawn circumspectly with due regard for the many difference between the statutory schemes." *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 383.[7] As we shall show—and as the Second Circuit, *see Price v. Auto Workers*, 795 F.2d 1128 (2d Cir. 1986), *pet. for cert. pending*, No. 86-1055, and five of the ten judges below concluded—the structure and history of the RLA are materially different from the NLRA with respect to the matters at issue in this case and as a result the considerations that led to the decisions in *Hanson* and *Street* compel precisely the opposite conclusion here.

**A. The Governmental Action Issue.**

It is, of course, undisputed, that neither CWA nor its local affiliates are agencies of the federal government or of any state or local government. Nor are the employers here—AT&T and C&P—government agencies. The relevant question then, for state-action purposes, is whether the conduct of these *private* entities in negotiating and enforcing a union security agreement "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1975).[8]

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[7] *Cf. Burlington & Northern Railroad v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 55 L.W. 4576 (April 28, 1987) (holding that RLA union is free to engage in secondary activity of a type proscribed by NLRA § 8(b)(4)).

[8] Because this case involves purely private actors, it is entirely unlike *Abood v. Detroit Board of Education, supra* n.1. There the employer was a public entity—a school board—and its ac-

Just last Term, in *San Fran. Arts & Athletics v. USOC*, —— U.S. ——, 55 L.W. 5061 (June 25, 1987), this Court reaffirmed the well-settled test for determining when private conduct is to be imputed to the government:

> [A] government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." [*Id.* at 5067, *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).]

"Careful adherence" to this "requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson*, 457 U.S. 922, 936 (1982).

Measured by that test, the instant case plainly involves purely private conduct. There can be no claim that the government "coerced" the parties to include a union security provision in their collective bargaining agreement. As even the panel majority below recognized, federal law with respect to the subject of union security agreements is merely "permissive": the law allows, but does not require such agreements, and "unless both [the employer and the union] give their permission there can be no [union security] contract." Pet. App. at 66a. Nor does federal law in any way "encourage" the making of union security agreements. No federal benefit is conferred on parties which agree to such a provision nor is any detriment visited upon parties who do not so agree. As this Court repeatedly has held, the "fundamental premise" of the national labor policy is "freedom of collective bargaining—'private bargaining under governmental su-

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tions in negotiating and enforcing a union security agreement, like all of its actions, constituted acts of the state. *See* 431 U.S. at 226 ("the actions of public employers surely constitute 'state action' "). Remarkably, the district court and the panel majority below failed to recognize this fundamental distinction between *Abood* and the instant case. *See* Pet. App. at 67a-68a.

pervision of the procedure alone, without any official compulsion over the actual terms of the contract.'" *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 272, 287 (1974). Chief Judge Winter put the point well in his dissenting opinion below:

> Federal legislation has not compelled the establishment of unions, nor has it compelled or even encouraged the adoption of agency shop agreements . . . Indeed, the NLRA does not compel the acceptance of any collective-bargaining terms. Rather, the employees, employers, and unions make these choices. [Pet. App. 12a; *see also Price v. Auto Workers*, *supra*, 795 F.2d at 1133].

Accordingly, the action of CWA and the Company in negotiating a union security agreement cannot be attributed to the federal government under the rule stated in *Blum v. Yaretsky*, *supra*, and reaffirmed in *San Francisco Arts & Athletics*. Indeed, that conclusion is far more obvious in this case than in *Yaretsky*.

The latter case involved a challenge to decisions made by the utilization review committees of various nursing homes to transfer the plaintiffs to facilities providing a lower level of care than the nursing homes in which the plaintiffs were living. Federal law mandated the establishment of these review committees, 457 U.S. at 994, federal law required the nursing homes "'to make all efforts possible to transfer patients to the appropriate level of care,'" *id.* at 1007-08, and federal law "impose[d] a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate," *id.* at 1009. Nonetheless the *Yaretsky* Court concluded that because federal law "do[es] not dictate the decision to discharge or transfer in a particular case," *id.* at 1010—*viz.*, because the transfer decisions themselves "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State," *id.* at 1009—the transfer decisions could not be imputed to the

state. *A fortiori* in this case, in which the challenge is to "judgments made by private parties" without any federal intervention whatsoever, the conduct at issue must be deemed to be private conduct.[9]

2. The two judges below (Russell and Chapman, JJ.) who found state action present here offered (in their opinion as the panel majority, to which they adhered on rehearing *en banc*, *see* Pet. App. 5a) two reasons for their state-action conclusion; neither is well-founded.

(a) First, Judges Russell and Chapman suggested that the government is implicated in union-security agreements in industries regulated by the NLRA because the NLRA "authorizes an employer and a union to enter into" such agreements and the Act thereby "cast[s] the weight of the Federal Government behind the agreements just as surely as if it has imposed them by statute.'" Pet. App. at 70a. But the only respect in which the NLRA "authorizes" union security agreements is that, by virtue of a proviso to § 8(a)(3) of the Act, such agreements are saved from condemnation by that section's otherwise blanket prohibition on discrimination against nonmembers of a union. In other words, the NLRA does nothing more than permit the parties to negotiate union security agreements.

Just last Term, this Court made clear that a statutory provision exempting certain private conduct from an otherwise applicable statutory prohibition does not transform the private conduct into state action. *See Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 55 L.W. 5005, 5008 & n.15 (June 24, 1987) (al-

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[9] *See also Jackson v. Metropolitan Edison Co., supra,* (decision of privately-owned public utility to terminate service not attributable to the state); *Rendell-Baker v. Kohn, supra* (decision of private school to discharge employee not attributable to state); *San Francisco Arts & Athletics v. USOC, supra* (decision of federally-chartered corporation not to allow use of term "Olympic" not attributable to state).

though religious employers are exempted from Title VII's prohibition on religious discrimination, their actions are not "fairly attributed to the Government"). That holding represents a specific application of a more general and well-established principle: the fact that a private party is "authorized to employ . . . a practice if it so desires" does not render the "exercise of the choice allowed by state law" into action of the state "where the initiative comes from the [private party] and not from the State." *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 357. Indeed, even governmental "approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky, supra*, 457 U.S. at 1004-05; *see San Fran. Arts & Athletics v. USOC, supra*, 55 L.W. at 5067 (same). Thus the fact that the union security agreements here are not made unlawful by—and in that sense alone may in colloquial terms be said to be "authorized" by—NLRA § 8(a)(3) does not support attributing such agreements to the government.

(b) Judges Russell and Chapman alternatively argued that the government is implicated in privately-negotiated union security agreements because a union's authority to negotiate such agreements " 'is grounded directly on the power given [the union] as a result of its status as bargaining representative.' " Pet. App. 702. It is, of course, true that the NLRA confers on a union that is designated as the bargaining representative by a majority of employees in an appropriate bargaining unit the status of exclusive representative of all employees in that unit and allows such unions to negotiate on behalf of all those employees. To that extent the NLRA can be said to vest those unions which enjoy the status of exclusive representative with the authority to negotiate for a union security agreement binding on all the bargaining unit employees.[10]

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[10] It should be noted, however, that in the absence of the NLRA, and of any state-law prohibition, a union and an employer could

But as Chief Judge Winter aptly stated below:

> Monopoly status, which is what the right to be exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. The issue was settled in *Jackson v. Metropolitan Edison.* The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. [Pet. App. at 100a; dissenting opinion].

This teaching of *Jackson v. Metropolitan Edison* is confirmed by last Term's decision in *San Fran. Arts & Athletics v. USOC.* That case involved a challenge to the United States Olympic Committee's ("USOC") refusal to allow San Francisco Arts & Athletics, Inc. ("SFAA") to use the word "Olympic" in connection with an athletic competition the SFAA was planning to hold. The USOC was created by the federal government as a federally-chartered corporation, and the USOC was granted by Congress exclusive use of the word "Olympic." Nonetheless, the Court concluded that USOC's action in refusing to license SFAA is not state action:

> The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise "[m]ere approval of or acquiescence in the initiatives" of the USOC. This is not enough to make the USOC's actions those of the Government. Because the USOC is not a governmental actor, the SFAA's claim that

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agree that the employer would only employ union members or only employ persons who agree to pay dues to the union. Indeed, as the United States points out in its brief *amicus curiae* in this case, "[e]mployers and unions established all types of union security agreements . . . before the NLRA was enacted." U.S. Br. at 24.

> the USOC has enforced its rights in a discriminatory manner must fail. [55 L.W. at 5067-68] [11]

Indeed, any other rule would sweep within the state action doctrine vast expanses of private activity. As the Court observed in *San Francisco Arts & Athletics*, "[a]ll corporations act under charters granted by a government, usually by a State," 55 L.W. at 5067; if any action which a state has empowered a private party to take were deemed action of the state, all corporate action would have to be so labeled. Similarly, under the theory of Judges Russell and Chapman, every union which enjoys the status of exclusive representative would engage in state action in negotiating a collective bargaining agreement as in all such cases the union's authority is

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[11] Four Justices dissented in *San Francisco Arts & Athletics* from the majority's finding of no state action, but adoption of the dissenters' theories would not have led to a state action finding here.

Justice Brennan's dissenting opinion advanced two grounds for finding state action in that case. First, Justice Brennan concluded that "the USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community." 55 L.W. at 5068. That, of course, is not true of unions whose function is to represent *employees* in seeking to secure favorable terms and conditions of employment.

Second, Justice Brennan found that the "USOC and the Federal Government exist in a symbiotic relationship sufficient to provide a nexus between the USOC's challenged action and the Government." *Id.* at 5070. *See also id.* at 5068 (O'Connor and Blackmun, JJ., dissenting) (agreeing with Justice Brennan that the USOC and the government "are joint participants in the challenged activity"). In this regard, Justice Brennan stressed that the USOC provides the United States "an exclusive and effective organization to coordinate and administer all amateur athletics related to international competition" and that "in the eye of the public . . . the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound." *Id.* at 5070. None of that is true here. The NLRA creates a system of collective bargaining which grants unions and employers certain rights and duties, but the government is not otherwise entangled with labor unions.

"grounded directly on the power given it" by the NLRA. Yet this Court has squarely rejected that contention on several occasions, holding union conduct to be private notwithstanding the union's status as exclusive representative. *See Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (collectively-bargained affirmative action plan "does not involve state action"); *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982) (union rule precluding candidates for union office from accepting campaign contributions from nonmembers "does not involve state action").

3. As previously noted, in *Railway Employes' Dept. v. Hanson, supra*, the Court found a union security agreement negotiated in an industry regulated by the RLA to be attributable to the state. But the Court's reasoning in *Hanson* has no relevance to union security agreements in industries regulated by the NLRA.

Like NLRA § 8(a)(3), RLA § 2, Eleventh permits unions and employers to enter into union security agreements if the parties so desire. But *unlike* NLRA § 8(a)(3), RLA § 2, Eleventh goes on to grant privately-negotiated union security agreements the force of federal law in the sense that such agreements *supersede any contrary state law*. This element of the RLA was critical to *Hanson*: it was because of the RLA's preemptive force that the Court in *Hanson* found that "justiciable questions under the First and Fifth Amendments were presented" by RLA 2, Eleventh. 351 U.S. at 231-32. Writing for the Court Justice Douglas reasoned that but for the RLA, the union security agreement at issue there would have been unlawful under the laws of the State of Nebraska and that therefore the "action on the part of Congress is a necessary part of every union shop contract . . . for without it such contracts could not be enforced." *Id.* at 231.[12] Justice Douglas added:

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[12] Even in a state like Maryland, which does not presently have a "right-to-work" law banning union security agreements, an

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements in the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction. [*Id.* at 231-32; citations omitted].

In sum, as Justice Stewart recognized in his opinion for the Court in *Abood*, *Hanson* "reasoned that government action was present" because "[h]ad it not been for the federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law"; in other words, it was because the RLA "preempts any attempt by a State to prohibit a union-shop agreement" that the Court in *Hanson* attributed the union security agreement to the government. *Abood*, *supra*, 431 U.S. at 218-19 n.12.

*Hanson* thus takes the state action doctrine quite far to reach private conduct which would be unlawful but for some act of the federal government or which enjoys an immunity from regulation granted by the federal government. Under that approach certain state laws which protect private parties against adverse action by other private parties create, as a matter of constitutional law, an indefeasible right. The *Hanson* opinion does not explain why—and we do not understand under the general state action theory why—federal action deregu-

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agreement negotiated in an industry regulated by the RLA stands on a different footing than an agreement negotiated in an industry covered by the NLRA because the former agreement enjoys a federally-conferred immunity from state regulation whereas the latter agreement does not and may be proscribed at any time. Thus, contrary to the panel majority below (*see* Pet. App. at 58-59a) the theory of *Hanson* can be understood to extend to *all* union security agreements negotiated under the RLA, and not just to those negotiated in states in which the preemptive force of the RLA is required to overcome an existing state prohibition.

lating an area previously regulated by one of the fifty states makes all private action freely undertaken by private parties thereafter, state action. But whatever *Hanson's* basis may be, the state action doctrine as enunciated in that case does *not* sweep in private agreements negotiated in an industry regulated by the NLRA. For unlike RLA § 2, Eleventh, *the NLRA does not dispute state laws which regulate union security agreements*; to the contrary NLRA § 14(b), 29 U.S.C. § 164(b), expressly preserves state authority in these matters. This distinction between the NLRA and the RLA was acknowledged both in *Hanson* itself, 351 U.S. at 323 n.5, and also in *Abood*, 431 U.S. at 218 n.12. *See also* Pet. App. 102a-04a (Winter, C.J., dissenting); *Price Auto Workers, supra*, 795 F.2d at 1132.

Given the NLRA's express anti-preemption provision saving the fifty states' regulatory authority to prohibit or permit union security agreements, the critical element of the state action ruling in *Hanson* is absent here. Accordingly, this case is controlled not by *Hanson* but by the line of cases from *Jackson v. Metropolitan Edison* to *San Francisco Arts & Athletics v. USOC.*

**B. The Statutory Question.**

**1. *The Statutory Language.***

"The starting point in statutory interpretation is the language of the statute itself." *United States v. James*, —— U.S. ——, 54 L.W. 5030, 5033 (July 2, 1986). The language of NLRA § 8(a)(3) "is not ambiguous," *Radio Officers Union v. Labor Board*, 347 U.S. 17, 42 (1954), and speaks directly to the issue posed in this case.

Section 8(a)(3) begins by making it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Standing alone, that prohibition would effectively outlaw employers from negotiating or complying with union security agreements. Similarly, if the prohibitory words of

§ 8(a)(3) were unqualified, unions would be precluded from negotiating or enforcing union security agreements since § 8(b)(2) makes it unlawful for a union "to cause or attempt to cause an employer to violate § 8(a)(3).

But the prohibitory words of § 8(a)(3) do *not* stand alone; that prohibition—and consequently the derivative prohibition on union action in § 8(b)(2)—are qualified by two provisos. The first privoso expressly recognizes the legality under federal law of certain types of union security agreements:

> Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the latter . . .

The second proviso limits the reach of the first but does so in a way that reinforces the first proviso's recognition of the legality under the NLRA of agreements of the type at issue here; this second proviso states:

> Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Read together, the meaning of § 8(a)(3) and its provisos could not be clearer. The brief *amicus curiae* for the United States in this case (which states the views to the National Labor Relations Board with respect to the meaning of § 8(a)(3), *see* U.S. Br. at 9 n.7), draws the lesson of the statutory language in the following terms:

> The plain language of these provisos appears to permit an employer (and hence a union) to enter into an agreement requiring all employees, including dissenters, as a condition of their continued employment, to pay uniform periodic dues and initiation fees. [U.S. Br. at 12].

And nothing in the statutory language

> give[s] any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other employees. To the contrary, the second proviso permits an employer to terminate any "employee," pursuant to an agreement permitted by the first proviso, if the employee fails "to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the union. [*Id.* at 13].

Thus, as the Solicitor General concludes, the holding below that respondents are entitled to pay less than full union dues because they object to certain of the union's activities "cannot be derived from the plain language of the statute." *Id.*[13]

### 2. *The Legislative History.*

There is a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, —— U.S. ——, 55 L.W. 4313, 4316 n.12 (March 9, 1987). Thus, absent "clearly expressed legislative intent contrary to that language," *id.*, the statutory

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[13] It is worth noting that the Board's submission to the Court in this case reflects the Board's consistent position both in its decisions, *e.g.*, *Union Starch & Refining Co.*, 87 NLRB 779 (1949), *enf'd* 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815; *Detroit Mailers Union No. 40 (Detroit Publishers Ass'n)*, 192 NLRB 952 (1971), and also in its prior briefs in this Court. For example, in *NLRB v. General Motors Corp.*, *supra*, the Board advised the Court that under the Act employee payments under union security agreements "go to defray not only expenses of collective bargaining . . . but also to finance welfare benefits and promote unionization, lobbying and political activity." Br. for the U.S. at 38, Oct. Term, 1962, No. 404.

language "must ordinarily be regarded as conclusive," *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case the legislative materials confirm that Congress intended precisely the result stated in the text of § 8(a)(3).

(a) Section 8(a)(3) originated in § 8(3) of the Wagner Act. As of 1935, union security agreements were, by and large, lawful under state law and many unions had succeeded in securing such agreements, including "closed shop" agreements under which an employer undertakes to hire only those who already are members of the union.[14]

Senator Wagner, the author of the Wagner Act, could see "no reason why Congress should make it [the closed shop] illegal in those places where public policy now sustains it." 2 National Labor Relations Board, *Legislative History of the National Labor Relations Act* at 2335. Accordingly, Senator Wagner drafted § 8(3) in such a way as "to preserve the status quo as to the legality of closed shop agreements under the common law in the different States." *Id.* at 1353. *See also* S. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935). Specifically, as enacted, § 8(3) contained the same prohibitory language now found in § 8(a)(3), but § 8(3) contained only one proviso which stated that "nothing in this Act . . . or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . ." The effect of this language was to neither proscribe nor affirmatively protect union security agreements but to leave the legality of such agreements solely to state law. *See Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949).[15]

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[14] *See, Colgate Co. v. Labor Board*, 338 U.S. 355, 381-83 (1949); Dulles & Dubofsky, *Labor in America*, 28, 61, 84, 98, 106 (4th ed. 1984); n.10 *supra*.

[15] The enactment of § 8(3) did limit the availability of union security agreements, including closed shops, in two respects.

(b) In 1947, Congress returned to the subject of union security in the course of enacting the Labor-Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"). It was through the LMRA that § 8(a)(3) took its present form.[16]

At the time the LMRA was enacted, union security agreements were lawful in all but 12 states. H.R. Rep. No. 245, 80th Cong. 1st Sess. at 34 (1947), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947*, at 325 (hereinafter cited as "LMRA Leg. Hist."). The 1947 Congress was advised by the Department of Labor that over 75% of employees working under collective agreements were in bargaining units covered by union security provisions. *See Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong. 1st Sess. 67 (1947).

The question of how to regulate union security agreements was one of the most hotly-contested issues that confronted the 1947 Congress. The legislative debate was focused on, and led to the enactment of, two new provisos to the old § 8(3) and to enactment of a new § 14(b). We therefore review the legislative materials pertaining to those provisions in particular detail.

(i) Within three months after the Eightieth Congress convened, the House Committee on Education and Labor chaired by Representative Hartley reported out a bill, H.R. 3020, to replace the Wagner Act *in toto*. As re-

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Whereas prior to 1935 any union—including a minority union or a company-dominated union—could seek a union security agreement, a proviso to § 8(3) allowed only unions that are majority representatives to sign such agreements and only if such unions are not employer-dominated.

[16] The statement in text requires one qualification. As enacted in 1947, the LMRA permitted union security agreements only when authorized by majority vote of the affected employees in an election conducted by the NLRB. That requirement was repealed four years later. *See* 61 Stat. 601.

ported—and as passed by the House—that bill contained several provisions of relevance here.

First, and most important, through its prohibition of discrimination on the basis of union membership and the exceptions created to that prohibition, the Hartley bill would have prohibited closed shop agreements but allowed union shop agreements under which all employees in an organized bargaining unit could be required to "tender[] . . . the initiation fees and dues regularly imposed as a condition of membership." H.R. 3020, §§ 8(a)(3), (c)(8), (d)(4), 80th Cong., 1st Sess. (1947), *reprinted in* 1 LMRA Leg. Hist. at 51, 56-57. The House Committee's report stated:

> The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed. . . . An employee may be expelled from the union and thus forced to leave his job only if the expulsion is by reason *of his failing to pay fees and dues imposed upon employees generally.* [H.R. Rep. No. 245, 80th Cong., 1st Sess. 9 (1947), *reprinted in* 1 LMRA Leg. Hist. at 300; emphasis added].

Second, the Hartley bill sought to regulate the practices of unions in fixing dues and initiation fees. Section 7(b) of that bill guaranteed union members the "right to be free from unreasonable or discriminatory financial demands of such organizations." 1 LMRA Leg. Hist. at 176. And § 8(c) of the bill—the "bill of rights for union members," H.R. Rep. No. 245, *supra*, at 31, 2 LMRA Leg. Hist. at 322—made it an unfair labor practice for a union

> to impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiation fees greater than that amount are reasonable

> under the circumstances; or to impose any dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such reasonable amounts as the members thereof . . . by a majority of those voting, after due notice to the membership, shall authorize. [H.R. 3020, *supra*, § 8(c)(2), 1 LMRA Leg. Hist. at 53].

The Committee report stated:

> [S]ection 8(c)(2) requires that fees, dues, and assessments be reasonable and uniform, as well as authorized by the members. . . . What is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors. [H.R. Rep. 245, *supra*, at 31, 1 LMRA Leg. Hist. at 322].

Third, the Hartley bill incorporated one restriction on the manner in which unions could expend their funds: the bill prohibited unions (and corporations) from making contributions to or expenditures on behalf of candidates for federal office. H.R. 3020, *supra*, § 304, 1 LMRA Leg. Hist. at 97-98. A similar prohibition on union contributions to federal candidates had been enacted by Congress on a temporary basis as part of the War Labor Disputes Act of 1943, 57 Stat. 167. The Hartley bill proposed to expand that provision and to make it permanent. *See* H.R. Rep. No. 245, *supra*, at 46, 1 LMRA Leg. Hist. at 337.

During the House debate over the Hartley bill, Representative Hoffman moved to strike those portions of the bill allowing union shop agrements and thereby to prohibit as a matter of federal law all forms of union security. *See* 1 LMRA Leg. Hist. at 732-33. That amendment prompted supporters of the Committee's bill to explain the theory of its union security provisions. For example, Representative Buck, a member of the House Labor Committee, opposed the amendment in the following terms:

> There are millions of workmen in this country today who are working under union-shop conditions. I dare say they are the majority of all employees in this country working under union contract.
>
> Let me outline again just what a union shop is. A man applies for work with a particular employer. . . . The employer takes him. Within 30 days the man joins the union. What is his obligation from then on? *He only has two obligations: No. 1, to pay the initiation fee which is regulated under the bill, and No. 2, to pay his dues. . . .*
>
> Mr. Chairman, if this amendment is agreed to we upset countless contracts in this country under which millions of men are working on union terms satisfactory to the men and satisfactory to the employer. [1 LMRA Leg. Hist. at 736-37; emphasis added].

Similarly, Representative Jenkins opposed the Hoffman amendment on the following ground:

> If you get a majority of the workmen in a plant who agree with the management of the plant that they want a union, why should they not have it? Many of the men of the minority of the employees, whether it be 49 percent or 30 percent or 15 percent, would get the benefit of that contract made between the majority of their fellow workmen and the management. *It seems to me that it is not unreasonable that they should go along and contribute dues like the others.* [1 *Id.* at 740].

After brief additional debate, the Hoffman amendment was defeated by voice vote. 1 *Id.* at 747. On April 17, 1947 the House approved the Hartley bill without changing any of the provisions relevant here. *See* 1 *Id.* at 158-225, 861-63. That same day, the Senate Labor and Public Welfare Committee, chaired by Senator Taft, reported out the Taft bill. *See* S. 1126, 80th Cong., 1st Sess. (1947), 1 LMRA Leg. Hist. at 99-157.

(ii) Like its House counterpart, the Senate Committee decided to amend the Wagner Act to prohibit closed shop

agreements, but not to outlaw other forms of union security. The Committee explained:

> We have felt on the record before us the abuses of the system have become too serious and numerous to justify permitting present laws to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated.
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> * * *
>
> Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired . . . *But in order to safeguard the rights of employees . . . membership in the union must be available to an employee on the same terms and conditions generally applicable to other members* . . . [S. Rep. No. 105, 80th Cong. 1st Sess. 6-7 (1947), 1 LMRA Leg. Hist. at 412-13; emphasis added].

The Committee added:

> The tests provided by the amendment [for determining whether an employee could lawfully be discharged] are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union. [*Id.* at 20, 1 LMRA Leg. Hist. at 426].

The Senate Committee elected not to otherwise regulate union financial practices or, indeed, any other aspect of internal union affairs. The Committee stated:

> In the course of its deliberations, the committee considered many other proposals, such as . . . the formulation of a code of rights for individual members of trade unions . . . In excluding these matters from the purview of the committee, the majority of the committee should not be understood as regarding such proposals as unsound or unworkable, but rather that the problems involved should receive more ex-

> tended study by a special joint congressional committee for which the committee bill specifically provides. In other words, the committee in this bill attempted to embody reforms which are long overdue and with respect to which the record of the hearings revealed widespread agreement on the part of informed and impartial persons. [S. Rep. No. 105, *supra*, at 2, 1 LMRA Leg. Hist. at 408].

On the floor of the Senate, Senator Taft played the principal role in explicating the theory and import of the Committee's proposal with respect to union security. In his opening statement introducing the bill Senator Taft stated:

> Mr. President, I have hesitated to support the complete outlawing of the union shop because the union shop has been in force in many industries for many years and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure. I think there are abuses . . . With respect to abuses . . . we have attempted to deal with them by [the Committee's amendments]. [2 *Id.* at 1010].

Senator Taft went on to identify the "abuses" to which the Committee's bill was addressed. To begin with, Taft argued, the closed shop was in and of itself an abuse because "[s]uch an arrangement gives the union tremendous power over the employees" and "abolishes a free labor market," *id;* Taft observed that the Committee had dealt with this "abuse" by "abolish[ing] the closed shop," *id.*

Senator Taft also noted that where there is an unrestricted union shop a union is able, through the exercise of its power to decide who to admit to or expel from membership, to effect 'the complete exclusion from an[] industry of a man who wants to work in that industry and whom the employer wants to employ, and who is perfectly competent to work there." *Id.* Senator Taft explained that the Labor Committee had addressed this situation by

> propos[ing] a proviso in the case where a man is refused admittance to a union . . . It is provided that in such case the employer shall not be compelled to discharge the man simply because the union will not let him join the union on the same terms and conditions as any other member. . . .
>
> . . . *The employee has to pay the union dues.* But . . . if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job. [*Id.*; emphasis added].[17]

Senator Taft elaborated on the practical effect of the Committee's proposal later in the debates in a lengthy colloquy with Senator Pepper with respect to the union security issue. Senator Taft there stated:

> The comittee . . . felt that if it permitted a union shop agreement which provided that every man must be a member of the union, the union must be reasonable, must accept as members all who apply for membership, and must accept them on the same term as it applies to other members, and must permit

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[17] Senator Ellender, a member of the Senate Labor Committee, gave concrete illustrations of the "abuse" to which Senator Taft referred, noting a case (involving one McGrath) in which an individual was "kicked out of the union, which meant the loss of his job" because the individual "was called in court to testify in regard to a fight which occurred between a union member and a foreman," and another case (involving Cecil B. DeMille) in which an individual was expelled and barred from working because he refused to pay a special "assessment" to the union. 2 LMRA Leg. Hist. at 1061-62. Senator Ellender explained how the Committee bill would prevent such situations from arising:

> In order to protect the employees, a union cannot cause the discharge of any of its members simply because it wants to blackball them such as in the DeMille or in the McGrath case. The union may still expel a man but so far as the employer is concerned he does not have to fire that man *so long as that employee pays his dues to the union.* I think this provision is bound to prevent such abuses as I discussed a while ago. [*Id.* at 1068; emphasis added].

them to remain in the union *if they are willing to pay their dues.*

* * *

. . . *If the employee is willing to pay his dues to the union,* the union cannot compel the employer to fire him because he is no longer a member of the union . . .

* * *

. . . [W]here [the union shop] is permitted, the unions should be required to let all employees join the union and continue to be members of the union so long *as they continue to pay their dues.* [2 *Id.* at 1096-97; emphasis added].

When Senator Pepper claimed that under the Committee bill, a union which negotiated a union security agreement would have to admit all applicants for membership, Senator Taft responded:

I did not say that. The union could refuse membership; *but if* [*the applicant*] *were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.* [2 *Id.* at 1141-42; emphasis added].

Senator Taft reiterated these points in arguing against an amendment offered by Senator Ball to proscribe all forms of union security agreements. *See* 2 *Id.* at 1418. Senator Taft again stated the basic theory of the Committee's union-security provisions: that it was unwise to outlaw union security agreements altogether "since there had been for such a long time so many union shops in the United States [and] so since in many trades it was entirely customary and had worked satisfactorily," and that therefore the appropriate approach was to "meet the problem of dealing with the abuses which had appeared." 2 *Id.* at 1420. Senator Taft added:

In this bill we are trying to be strictly practical and to meet the actual problem which have arisen, *and not go into the broader fields of the rights of particular persons.* [2 *Id.* at 1421; emphasis added].

Senator Taft went on once again to identify the "abuses" or "actual problems" that had arisen under the Wagner Act's union-security provision: namely the existence of closed shops which destroy "freedom of labor" and the existence of "arbitrary rules on the part of unions" which were used to foreclose certain individuals from securing employment. 2 *Id.* at 1420-21. In so doing Senator Taft reiterated the Labor Committee's solution to these "abuses":

> Under our provision in the committee bill, the closed shop is abolished, and a man can get a job with an employer and continue in that job if, in effect, he joins the union *and pays the union dues.* [*Id.*; emphasis added].

Senator Taft added:

> The great difference [between the closed shop and the union shop] is that [under the union shop] in the first instance a man can get a job without joining the union or asking favors of the union . . . *The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job.* [2 *Id.* at 1422; emphasis added].

And of special significance to the issues posed here, Senator Taft continued:

> Mr. President, while I think of it, I should like to say that the rule adopted by the committee is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that there can be a closed shop or a union shop, and the union does not have to admit an employee who applies for union membership, but the employee must, nevertheless pay dues, even though he does not join the union.
>
> If he pays the dues without joining the union, he has the right to be employed. [2 *Id.* at 1422].

The case referred to in this passage was *Ford Motor Co. of Canada*, 1 BNA Arb. Rep. 439, 17 LRRM 2783 (1946), under which nonmembers covered by a union security provision are required to pay an amount equal to membership dues, but are not required to pay special assessments. The arbitrator in that case, Justice I. C. Rand of the Canadian Supreme Court, reasoned that requiring all employees to pay union dues is just because a union provides "security to the body of employees" and dues represent the amount "members are satisfied to pay for substantially the same benefits." 1 BNA Lab. Arb. at 444.

The Ball amendment eventually was defeated, 2 LMRA Leg. Hist. at 1428, and the Taft bill, with the union security provisions developed by the Labor Committee, was approved by the Senate, 2 *id.* at 1522.

(iii) The Hartley and Taft bills were referred to a conference committee which crafted the union-security provisions enacted as part of the LMRA.

Because both the House and the Senate had acted to proscribe closed shops but to permit union shops, the conference committee had no difficulty in so agreeing as well. Nor did the conference committee face any disagreement with respect to adding § 14(b) to the law to expressly preserve the states' authority to regulate union security agreements, since both the House and the Senate had proceeded on the premise that these matters would continue to be subject to state regulation. And the conferees likewise easily agreed to place a limitation on those union security agreements which would be permitted under the Act so as to preclude such agreements from being used to procure the discharge of an individual who agreed to pay union dues. The conference report stated:

> As a protection to the individual worker against arbitrary action by the union, it is further provided that an employer is not justified in discriminating against an employee with respect to whom the em-

> ployer has reason to believe membership in the union was not available on *the same terms as those generally applicable to other members*, or with respect to whom the employer has reasons to believe membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership.* [H.R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), 1 LMRA Leg. Hist. at 545 (emphasis added)].

While on all these points the House and Senate bills were in accord, the conference committee did confront disagreements with respect to those provisions in the House bill which made it unlawful for a union to charge "unreasonable" dues or initiation fees and which prohibited unions from making contributions to or expenditures on behalf of candidates for federal office, as the Senate bill had no counterparts to either provision. The conference resolved this disagreement as follows.

First, "with little apparent discussion or opposition," *Pipefitters v. United States*, 407 U.S. 385, 405 (1972), the conferees adopted (in LMRA § 304) the Hartley bill's prohibition limiting what unions may spend from dues money on federal elections. That provision was codified in Ttitle 18 of the United States Code as a criminal provision and was later superseded by the Federal Election Campaign Act of 1976, Title II § 201(a), 90 Stat. 496.[18]

Second, the conferees decided to drop the House's "bill of rights" in its entirety, including the provision regulation to the amount of dues a union could charge.[19] In lieu of the latter provision, the conference committee

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[18] The FECA creates an administrative procedure, *see* 2 U.S.C. § 437, to enforce its prohibition on union political expenditures, 2 U.S.C. § 441b.

[19] *See NLRB v. Financial Institution Employees*, —— U.S. ——, 54 L.W. 4203, 4207 n.11 (Feb. 26, 1986).

crafted a new section, enacted as § 8(b)(5), which makes it unlawful for a union which negotiates a union security agreement to require "as a condition precedent to becoming a member . . . a fee in an amount which the Board finds excessive or discriminatory under all the circumstances."

In a statement describing the conference agreement on this point, Senator Taft explained the provision as follows:

> In the House bill union initiation fees were among 10 provisions providing for certain rights and immunities of members of labor organizations against arbitrary action by the officers of a union to which they belonged. This was the so-called bill of rights subsection in the House bill. The Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions. In the opinion of the Senate conferees the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection. . . . [T]he House group did point out, however, that . . . the Senate amendment did not sufficiently deal with the situation in which unions wishing to constitute a monopoly of certain trades might pass a resolution requiring all new members to pay exorbitant initiation fees and thereby frustrate the intent of the Senate bill. The House bill limited initiation fees to $25 per member except where a greater amount was permitted by the Board. The Senate conferees were of the opinion that it was not practical to set a definite amount of law but were willing to accept the principle that where employment was conditioned upon membership in a labor organization

> exorbitant initiation fees should not be charged. [2 LMRA Leg. Hist. at 1540].[20]

In a suplemental statement responding to charges that § 8(b)(5) was unduly intrusive on internal union affairs, Senator Taft stressed that this provision "*is limited to initiation fees and does not cover dues.*" 2 *Id.* at 1623; emphasis added.

(c) The legislative materials just reviewed establish that in enacting § 8(a)(3) Congress meant what the plain words of that section so clearly state: the NLRA leaves employers and unions free to adopt and enforce union security agreements requiring all employees in a bargaining unit to pay an amount equal to union dues without regard to whether a particular employee objects to the uses the union makes of its monies. Three aspects of the legislative history compel this conclusion.

*First*, and most importantly, the debates in Congress with respect to § 8(a)(3) itself leave no doubt that this is what Congress understood and intended. Those debates show that in crafting the proviso to § 8(a)(3) Congress was attempting "only to 'remedy the most serious abuses of compulsory union membership . . .'" *NLRB v. General Motors Corp., supra*, 373 U.S. at 741. The particular "abuses" Congress identified and attempted to correct were the closed shop and those union shops in which unions were free to arbitrarily or discriminatorily deny membership to a particular individual and then compel

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[20] *See also* H.R. Rep. No. 510, *supra*, at 46, 1 LMRA Leg. Hist. at 550 (statement of House conferees):

> Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5)) . . . The other parts of this subsection are omitted from the conference agreement as unfair labor practices . . .

the discharge of that individual because of his nonmembership. *See* pp. 30-31, 33 *supra*. Congress' solution to these problems was to ban the closed shop and to adopt the "Rand formula," pp. 33-34 *supra*, permitting the enforcement of union shop agreements only to the extent that membership was available "*on the same terms*" to all bargaining-unit employees, Congress was of the view that, as Senator Taft stated, "[t]he fact that the employee will have to pay dues to the union seems to be to be much less important." P. 33 *supra*. Thus, far from creating special privileges for employees covered by union security agreements who object to particular union expenditures to pay less than full union dues, the entire thrust of Congress' effort in 1947 was to assure that each such employee would "contribute dues like the others," p. 28 *supra* (Rep. Jenkins), or, as Senator Taft put it, that each employee would "pay the same dues as other members of the union," p. 32 *supra*.

*Second*, the legislative materials show that in enacting the provisions just described, Congress decided "not to go into the broader fields of the rights of particular persons," p. 32, *supra* (Sen. Taft), and more particularly not to regulate the internal decisions of unions with respect to the level of their dues. The Senate Labor Committee noted early on in the evolution of the LMRA that any limitation on the circumstances in which a nonmember could be discharged pursuant to a union security agreement must be "based on facts readily ascertainable and . . . not require the employer to inquire into the internal affairs of the union." P. 29 *supra*. And the Senate conferees refused to accept the House's bill of rights provision which would have proscribed "unreasonable" dues (and, thus, would have forbidden the discharge of an employee who refused to pay dues found to be "unreasonable").[21] Pp. 35-36.

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[21] The Senate conferees' caution in these regards reflected the fact that in developing the LMRA Congress faced a "predictable

*Third*, the legislative history shows that in enacting the LMRA Congress placed one, and only one, limitation on the uses which can be made of union dues: Congress continued (and expanded) the previously enacted prohibition on the use of dues money for making contributions to federal candidates. P. 35 *supra*. The fact that the 1947 Congress deemed it necessary to enact a specific provision to thus protect union members from having their dues payment used against their will for certain political purposes makes it clear that Congress did not believe that § 8(a)(3) itself prohibited such expenditures or granted objectors a right to refuse to fund activities to which they object.

In sum, as the Solicitor General and NLRB conclude in their brief *amicus curiae*:

> The legislative history of Taft-Hartley cannot be reconciled with the argument that the statute . . . precludes an employer and a union from agreeing to require both union member and non-union member employees to pay uniform fees that the union may use for both collective bargaining purposes and non-collective bargaining purposes. In 1947, Congress was principally concerned with insulating workers' jobs from capricious actions by union leaders . . . But it rejected proposals to place general federal restrictions on either the dues equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents. Rather, though it was well aware that union dues are used for "a variety of purposes in addition to meeting the union's costs of collective bargaining" (*Retail Clerks v. Schermberhorn*, 373 U.S. [746,] 754), Congress

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presidential veto," *Pipefitters v. United States*, *supra*, 407 U.S. at 409, as President Truman the prior year had vetoed the Case bill, the "direct antecedent" of the LMRA, *Doud Box Co. v. Courtney*, 368 U.S. 502, 509 (1967). The conferees therefore sought to frame a measure which could gain sufficient support to override such a veto. *See* 1 Leg. Hist. at 882, 883-84 (Rep. Hartley).

only banned unions from using union security provisions to exact more than the initiation fees and "periodic dues" uniformly required as conditions of union membership. Otherwise, it determined that the regulation of union security agreements should be left to specific federal legislation and to the legislatures and courts of the several states. [U.S. Br. at 18-20].

### 3. *The Asserted Analogy to the Railway Labor Act.*

As previously noted, in *Machinists v. Street*, *supra*, this Court concluded that § 2, Eleventh of the RLA "is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768. The panel majority—and, presumably, the three other judges on the *en banc* court who, without explanation, sided with the panel majority—relied heavily on *Street* in concluding that NLRA § 8(a)(3) contains an identical prohibition. For two reasons, however, this reliance on *Street* is misplaced.

First, *Street* was decided in the light of *Hanson*'s holding that the government is implicated in union security agreements negotiated in industries regulated by the RLA and that therefore a challenge to such an agreement raised "justiciable questions under the First and Fifth Amendments," *Hanson*, 351 U.S. at 231. Given *Hanson*'s holding, the Court in *Street* correctly began its analysis from the premise that if RLA § 2, Eleventh were held to authorize union security agreements which require each employee to contribute to all activities of the union, including political or ideological activities to which the employee objects, constitutional "questions of the utmost gravity" would be presented. *Street*, 367 U.S. at 749. Mindful of the "restraints against unnecessary constitutional decisions," the Court in *Street* thus sought to " 'ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Id.* In other words, as Justice Stewart (who joined the Court's opinion in *Street*) later stated in his opinion for the

Court in *Abood*, the *Street* Court "embraced an interpretation of [§ 2, Eleventh of] of the Railway Labor Act not without its difficulties precisely to avoid facing the constitutional issues presented." 431 U.S. at 232.

In the NLRA context, in contrast, as we have seen, pp. 12-20, *supra*, there is no basis for attributing to the government a union security agreement negotiated by private parties who are subject to state law in this regard. That being so, there are no constitutional issues lurking here and no need to reach for an interpretation of NLRA § 8(a)(3) analogous to the "possibl[e]" construction of the RLA that *Street* embraced notwithstanding the "difficulties" of that construction. For that reason alone, *Street* does not guide the construction of NLRA § 8(a)(3).

Moreover, the considerations that enabled the *Street* Court to conclude that it is " 'fairly possible' " to read RLA § 2, Eleventh to proscribe union security agreements requiring uniform payments from all bargaining-unit employees are wholly absent with respect to NLRA § 8(a)(3).

*Street* stressed the fact that from 1926, when the RLA was first enacted, until 1951 when § 2 Eleventh assumed its present form, that Act *prohibited all forms of union security* and declared a "policy of complete freedom of choice of employees to join or not to join a union." 367 U.S. at 750. Given that background, the Court was persuaded that it was at least possible to conclude that when Congress amended the RLA in 1951 to permit union security agreements, "Congress did not completely abandon the policy of full freedom of choice embodied in the . . . Act but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.' " *Id.* at 767.

In all relevant respects the legislative history of NLRA § 8(a)(3) is the opposite of the history of RLA § 2, Eleventh, and the lessons to be drawn from the NLRA are

also the opposite of the lesson drawn in *Street*. As we have seen, the original policy of the Wagner Act was to *permit all forms of union security agreement* (including even closed shops), and such agreements were a commonplace in 1947, when NLRA § 8(a)(3) took its present form. Thus, in enacting the LMRA Congress was not making "inroads" on a policy of "full freedom of choice" in order to respond to a specific problem facing unions; rather the 1947 amendments to NLRA § 8(a)(3) were designed to make an inroad into a preexisting policy of the *absolute freedom of private parties under federal law to negotiate union security agreements*. And just as the "inroad" Congress made in 1951 in the RLA "full freedom of choice" policy was for a "limited purpose" of addressing a particular "problem[]" so, too, the "inroad" Congress made in 1947 in the NLRA policy of private freedom in collective bargaining was a "limited" one to respond to carefully-defined "abuses" that Congress concluded had arisen in the union security agreements permitted by the Wagner Act.

Because there is no evidence that Congress conceived of agreements requiring uniform dues payments by all bargaining-unit employees as an "abuse"—indeed, because the legislative materials demonstrate that Congress viewed such agreements as the *solution* to the union security controversy—NLRA § 8(a)(3) cannot plausibly be read as was RLA § 2, Eleventh to permit only limited forms of union security.

Once again, the brief of the United States makes the point well: "the premises on which the *Street* Court rested its interpretation of Section 2, Eleventh are missing in the context of the NLRA." U.S. Br. at 21. Whereas "the *Street* Court believed that it was acting in the shadow of a serious First Amendment question," there is "no comparable First Amendment question in the context of the NLRA." *Id.* at 21-22. And while "the *Street* Court's interpretation of Section 2, Eleventh was

influenced by the 'open shop' history of the railway industry," in "industries covered by the NLRA the history of union security agreements was quite different" and thus "the historical considerations that underlay the *Street* decision point in a quite different direction than does the history of the NLRA." *Id.* at 22-23. *See also* Pet. App. at 91a-97a (Winter, C.J., dissenting).

In sum, nothing in the RLA or in *Street* suffices to overturn the conclusion which the NLRA's language and history unmistakably compel: Congress decided to permit unions and employees in industries regulated by the NLRA to enter and enforce union security agreements requiring all bargaining unit employees to pay an amount equal to union dues.

**C. The Lessons.**

What remains is to apply the lesson of the foregoing state action and NLRA analysis to the specific claims made by plaintiffs here over which the federal courts have jurisdiction.

(1) That plaintiffs' First Amendment claim fails in the absence of state action is self-evident. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). *See also Rendell-Baker v. Kohn, supra*, 457 U.S. at 837. Because the collective bargaining agreement here which conditions continued employment on the payment of an amount equal to union dues is not attributable to the government, that agreement cannot violate the First Amendment.

(2) Similarly, our showing that in enacting the LMRA Congress expressly decided that federal law should not invalidate union security agreements requiring payment of union dues by all bargaining unit employees is necessarily dispositive of plaintiffs' fair-representation claim.

This Court has made clear that the duty of fair representation is a "statutory duty," *Vaca v. Sipes*, *supra*, 386 U.S. at 177, that is "implicit in the National Labor Relations Act," *Electrical Workers v. Foust*, *supra*, 442 U.S. at 46-47 n.8. *See also Del Costello v. Teamsters*, *supra*, 462 U.S. at 164 n.14. That being so, Congress' decision to allow parties covered by the NLRA to enter into union security agreements of the type involved here must be controlling in defining the parameters of the duty of fair representation that has been derived from the Act. Simply stated, it would be contrary to every rule of statutory construction to conclude that the very form of union security agreements that Congress decided to allow in enacting § 8(a)(3) is nonetheless violative of a duty implied from the statute of which § 8(a)(3) is a part.

The language of § 8(a)(3) makes this crystal clear and bears quoting again. After condemning in general terms discrimination on the basis of union membership, the section goes on to provide that "*nothing in this Act, or in any other statute of the United States* shall preclude an employer from making" a union security agreement allowed by the section (emphasis added). Thus, by its very terms § 8(a)(3) states that the permissions contained in the provisos to that section supersede any prohibition that might somehow be contained elsewhere in the Act. Given this explicit and unambiguous language, plaintiffs' effort to convert the duty of fair representation into a prohibition on conduct Congress decided to allow in enacting § 8(a)(3) must fail.[22]

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[22] Without treating § 8(a)(3)'s express language, Judge Murnaghan concluded that the limits Congress placed on the reach of § 8(a)(3)'s prohibitions are not determinative of the scope of the duty of fair representation. *See* Pet. App. 18a-21a (concurring opinion). In this regard, Judge Murnaghan made two points, neither of which bears scrutiny.

First, Judge Murnaghan argued that although "both the drafters of the House bill and Senator Taft endorsed the union shop" that

(3) There is a second and independent reason why plaintiffs' fair-representation claim must be rejected: even without the guidance provided by § 8(a)(3) and its legislative history, there would be no basis for concluding that a union violates the duty of fair-representation by negotiating a union security agreement requiring all members of a bargaining unit to pay an equal amount of union dues, or by expending such dues on activities "beyond that allocable to collective bargaining, or contract administration, or grievance adjustments," p. 2, *supra*.

(a) As previously noted, a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, *supra*, 386 U.S. at 190. Plainly here the union has not acted in a "*discriminatory*" fashion; to the contrary, as

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fact has "no bearing on agency shops or agency fees." Pet. App. 20a n.14. But this misses the essential point that the statute, in terms and in its intent, contemplates *at a minimum* that all employees may be required to pay union dues. Indeed, under *NLRB v. General Motors*, *supra*, that is the *only* obligation that may be imposed on objecting employees. Senator Taft made explicit that such an obligation could be placed on nonmembers, stating that Congress was adopting the Canadian "Rand formula" under which employees cannot be required to join a union but can be compelled to pay dues. Thus, while Senator Taft did not use the term "agency shop" the words he used embrace that form of union security.

Second, Judge Murnaghan asserted that the only inference to be drawn from the rejection of the House's bill of rights is

> merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions. Nothing in the legislative history indicates that Congress intended to preclude the development of such restrictions by the court under the principles of the duty of fair representation. [Pet. App. 19a]

But the legislative materials set forth at pp. 23-40, *supra* show that the Senate rejected the House's bill in order to avoid governmental "policing of the internal affairs of the union." There is simply no basis for the theory that Congress viewed *judicial* oversight of union dues and expenditures more favorably than oversight by the NLRA.

the Second Circuit observed in an indistinguishable case, the plaintiffs' "contention is that, in this instance, they *should* be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause." *Price v. Auto Workers*, *supra*, 795 F.2d at 1136 (emphasis in original). Nor is there any basis for believing—let alone any factual finding by the courts below—that the union was animated by "*bad faith*" in insisting that all persons represented by the union pay an equal amount to the union, or by using the funds thus collected to engage in the range of activities "regularly engaged in by modern unions," *id.*, including activities that are not strictly part of the union's role as bargaining representative narrowly defined. Thus, the only basis on which a union could be found to have breached its duty of fair representation here would be on the theory that it is "arbitrary" of the Union not to permit objectors to pay less than full union dues, or to use dues money—at least of objectors—to engage in activity beyond the realm of collective bargaining narrowly defined. Such a theory cannot withstand analysis.

(b) Requiring all persons represented by a union within a bargaining unit to pay the same amount to the union is an entirely rational, non-arbitrary course for a union to take. A union represents—indeed must represent—all employees within the bargaining unit, and the union's accomplishments necessarily redound to the benefit of all members of the unit; that is true not only of gains achieved by a union in negotiating and administering collective bargaining agreements but also of gains achieved by the union through other means of furthering the represented workers' employment interests. It is therefore surely fair and rationale to require all members of the bargaining unit to contribute equally to the support of the union.

Furthermore, establishing a uniform dues level for all bargaining-unit members prevents the friction among

employees that otherwise can arise within a bargaining unit if some employees pay less in union dues than others and avoids the substantial expense entailed in determining each year what portion of the union's expenditures are devoted to activities germane to the union's role as exclusive representative and what portion goes for other activities. The costs of making these calculations are discussed in detail in the brief for the AFL-CIO as *amicus curiae* in this case; for present purposes it suffices to note that it is hardly arbitrary for a union to decline to maintain the records and perform the analyses necessary to make such calculations each year and instead to decide to charge each employee in the bargaining unit the same amount.

(c) Nor is there any basis for concluding that a union breaches its duty of fair representation by expending dues money for activities beyond direct collective bargaining narrowly defined. Unions, after all, exist to advance the employment interests of the workers the union represent, and those interests can be advanced away from the bargaining table as well as at the table. Unions thus act in accordance with their *raison d'etre* when, *e.g.*, they turn to the legislative arena or the judicial arena to further the interests of workers, or when they seek to forge alliances with labor unions in other countries, or with other groups in this country who share common concerns. As Judge Cardamone observed for the Second Circuit in *Price*, these are "activities regularly engaged in by modern unions." 795 F.2d at 1136.

Indeed, a union's decision to expend resources in this way—or in any other way for that matter—does not even implicate, let alone offend, fair-representation concerns. As the late Judge Tamm explained in his opinion for the court in *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983), dismissing a fair-representation challenge to a union's refusal to pay strike benefits to persons not actively participating in a strike:

> Arising as it does out of a union's privilege under section 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is co-extensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them at all—namely, "rates of pay, wages, hours . . . , or other conditions of employment." In other words, the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure. [712 F.2d at 481; citations omitted; emphasis in original; *see also* Pet. App. 24a (Winter, C.J., dissenting); *Price Auto Works*, *supra*, 795 F.2d at 1136].

In sum, neither the collection of uniform dues from all employees in the bargaining unit nor the expenditure of such monies on activities other than direct collective bargaining narrowly defined constitutes arbitrary, discriminatory, or bad faith conduct. Thus, even if Congress had not specially decided that such conduct is not contrary to the NLRA, there would be no basis for holding that such activity breaches the duty of fair representation.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to direct the district court to dismiss plaintiffs' complaint.

Respectfully submitted,

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# APPENDIX

## APPENDIX

## STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) provides as follows:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally

applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a suit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), provides in pertinent part as follows:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provides in pertinent part as follows:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days fol-

lowing the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

The First Amendment to the United States Constitution provides in pertinent part as follows:

Congress shall make no law abridging the freedom of speech.